No. 83-87

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IN THE

Supreme Court of the United States

October Term, 1983

Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart,

Petitioners,

v.

Jesse A. Vail,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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CONSENT TO FILING

Counsel for Petitioners and for Respondent have consented by telephone to the filing of the within brief by National School Boards Association. The letters confirming that consent are in the mail and will be submitted to the Court as soon as they are received.

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education and to encourage the most efficient and effective organization and administration of the public schools.

Established in 1940, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

If the decision of the court below is affirmed, it will subject each school board to the burdensome task of providing a due process procedure before non-renewing probationary employees even though adequate state procedures exist to remedy any wrongful action by the school board.

ISSUE PRESENTED FOR REVIEW

If adequate state "common law" or statutory procedures exist to remedy an alleged breach of contract, does a public employee have an independent right to seek redress in the federal courts pursuant to the due process clause of the fourteenth amendment of the United States Constitution?

ARGUMENT

Introduction

A statement in the concurring opinion of Circuit Judge Eschbach below evidences the prevalent misunderstanding of circuit courts as to the purpose and meaning of the due process clause of the fourteenth amendment to the United States Constitution.

Judge Eschbach attempts to distinguish between federal and state "interests" in cases such as the one at bar, slip op. at page 25, through a quotation from a Seventh Circuit opinion, Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972):

> A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached.
>
> A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will

> lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing. 471 F.2d at 494 n.15.

How can school board members be expected to do their jobs when the guidance they receive from federal courts is in a form such as that quoted above? A breach is a breach is a breach. Either there is a contract right, under state law, or there is not. Nor does the state's jurisdiction end when a contract right is found, because if the state provides due process before the matter is finally resolved, no federal constitutional question will even arise.

Is there a property right to be protected?

The threshold question in any due process case is whether there is a "life, liberty or property" interest to be protected. Some federal rights are created by the Constitution and are inalienable and absolute, notwithstanding state laws. "Property" rights on other hand,

are not federal rights. Property rights, if granted by the states, are merely protected by the Constitution from an arbitrary taking by the state.

One basic flaw in the reasoning of the decision below is its assumption that a property right exists under Illinois law. Before any right to due process comes into play there must be a showing that the property right, in this case the right under the alleged "implied contract," exists. Apparently, there is a dispute here as to whether a "contract" action even exists under Illinois law, given the existence of very specific state statutory language on teacher tenure and the dispute as to the nature of assurances made to respondent.

Most state teacher contract laws define "tenure" as the right to continuation of employment from year-to-year and provide for certain notice and hearing rights where a district seeks to non-renew a tenured teacher. These laws also set forth when that tenure right arises. Under

every state tenure law, the right does not arise until the teacher has been employed for a stated period of time. Prior to that time the teacher is probationary, and the district can terminate the teacher at the end of each probationary year for any reason except those involving fundamental rights such as the first amendment. See Appendix A.

These days many school districts, which in the past have been in a position to give tenure to all of their probationary teachers, are no longer able to do so. This may be due to a variety of reasons such as decreasing enrollments, decreasing state and federal funding, failure of a property tax bond issue, or unforeseen massive expenditures. Yet, the probationary teachers who were not re-hired might argue that they had a reasonable "expectation" to continued employment because of the district's past custom of giving tenure to probationary teachers.

Further, if there is such an "implied contract" cause of action in Illinois, do the facts

in this case state such a cause of action? Surely those decisions should be made by state, not federal, courts.

The ruling below, if affirmed, will have broad ramifications for the management of school districts across the country. The ruling applies even where there is a factual dispute as to the existence of a contract. Thus, in order to comply with the order below, a school board would have to offer a notice and hearing to any employee who is non-renewed, even though the board made no representations to the employee which would give rise to an "implied contract" situation. Any time a school board, superintendent or other hiring official, non-renews or refuses to enter into a contract with an existing employee the board must provide reasons, notice and hearing to that employee in order to avoid a federal lawsuit. The cost and administrative burden are enormous.

Yet in the absence of such a hearing, how is the school board to defend itself from an action

in federal court that the employees' claim is a real "expectation" and not merely unilateral. Since in most cases of non-renewal there is no such "expectation," is it not more reasonable to allow employees who believe they have an "implied contract" to resort to state breach of contract remedies rather than putting the burden on the school board to conduct pre-termination hearings in every situation of non-renewal, just to avoid the possibility that an employee may allege an "implied contract?"

As stated by the Supreme Court in Regents v. Roth, 408 U.S. 564 (1972):

> "[P]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." The claimant "must have more than an abstract need or desire for [a benefit]. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it."

Unfortunately, the court below has taken up

Justice Marshall's statement in Roth to the effect that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment." In other words the court, has put the burden on the employer to prove there is no federal claim.

It should not be the province of federal courts to make the initial decision as to whether a "contract" right exists. That duty lies with state courts.

What process is "due"?

Where it has been established that a contract right exists under state law, either because the parties admit to its existence or a state court has so ruled, the next issue to be addressed is whether due process procedures exist in the state to protect that right, and whether, in fact, such procedures have been followed.

The Constitution itself does not set forth

what process is "due" or whether that process must be afforded before or after the deprivation of the property. The general guiding principle in several Supreme Court cases is that "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Mango, 380 U.S. 545 (1965), Mathews v. Eldridge, 424 U.S. 319 (1976); Parratt v. Taylor, 451 U.S. 527 (1981).

The purpose of the due process clause is to prevent substantial injustice and to assure that persons wrongfully deprived of their property are made whole. It was not designed to supplant the common or statutory law of each state, but rather, to protect state-created rights from an arbitrary and capricious taking by the state.

Both majority opinions below rely in great measure on Perry v. Sinderman 408 U.S. 601 (1972) and Regents v. Roth, 408 U.S. 564 (1972) to support their positions on both the "property" interest issue and the issue of what

process is "due." Perry and Roth, although certainly the leading cases on the issue of what is a "property" right, do not discuss the question of what process is "due".

In Regents v. Roth the Court held that, under the facts presented, the "expectancy" of employment was not sufficient to be raised to the level of a "property" right. Sinderman held that a "property" right may arise out of an "implied contract" but the case was remanded on the question of whether there was such a contract and whether it had been breached without due process. The Court in Sinderman cites Corbin on Contracts in support of its opinion that a contract may be implied by the conduct of the parties, regardless of the lack of a formal written contract or system of tenure. Thus, the Court did not create a new federal property right arising out of the custom of the parties. It merely relied on state common law to support its decision.

It should also be noted that the plaintiff

in Sinderman, although raising the due process clause as an alternative claim, relied primarily on a claim of a first amendment violation. In a situation where a complaint raises both first amendment and due process claims, it might be appropriate for a federal court to take jurisdiction over the case even though state remedies exist to deal with the due process claim. In the case at bar, however, no allegations are made that the school board violated any right other than some amorphous right to be free from an alleged breach of contract.

Contrary to Judge Eschbach's decision below, slip op. at 11, nothing in Roth or Sinderman precludes a finding for the school board in this case.

More directly in point on the issue of what process is "due" are three decisions of this Court, Bishop v. Wood, 426 U.S. 341 (1976), Parratt v. Taylor 451 U.S. 527 (1981), and Paul v. Davis 424 U.S. 693(1976). Bishop and Parratt both involved alleged deprivations

of "property" interests, with the Court holding that the state remedies in Bishop - breach of contract and in Parratt--tort remedy for conversion, met constitutional standards of due process.

In Bishop the Supreme Court upheld the district court's finding that the plaintiff policeman, although a "permanent" employee under local ordinance, nevertheless "held his position at the will and pleasure of the city." The lower court further held that the City Manager's determination "of the adequacy of the grounds for discharge is not subject to judicial review." The lower court here, however, dismisses that holding, relying instead on language following Sinderman and Roth to the effect that a person may have a "property" interest in an "implied contract."

The relevant portion of Bishop is laid out in a statement by Justice Stevens:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are

> made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs.

Justice Stevens goes on to suggest that federal courts must abstain in these cases because these civil wrongs, where they do not implicate inalienable rights such as those under the first amendment, "can best be corrected in other ways. The due process clause is not a guarantee against incorrect or ill-advised personnel decisions."

In Parratt the Court held that state tort remedies were sufficient to make the claimant whole, even though admittedly the state had deprived claimant, a prisoner in the state penitentiary, of his property by losing certain hobby materials.

The court below grants short shift to Parratt on the ground that the precedent set in that case was, in the court's opinion below, laid to rest by the High Court in its decision in Logan v. Zimmerman. That is incorrect.

The Supreme Court carefully distinguished Parratt from Zimmerman by stating that, unlike Parratt, Zimmerman dealt with an established state procedure that destroyed the "liberty" interest of the complainant without according him proper procedural safeguards. While there was unanimity in the result, given the established state policy and practice, there was great diversity in the rationale of the Zimmerman Court. Zimmerman in no way limits the clear ruling in Parratt.

Paul v. Davis, supra, is a "liberty" interest case in which the plaintiff claimed a deprivation of "liberty" in his good name as the result of defamation by a state employee acting under color of law. The Court deferred to the state courts, stating that the complaint raised a "classical claim for defamation actionable in the [state] courts."

Unlike "property" interests, "liberty" interests exist even in the absence of state law and may even supercede state law, e.g. Roe v.

Wade, 410 U.S. 113 (1973). Yet this Court, in Paul v. Davis, held that state common law remedies, where they exist, are sufficient to protect even these higher rights, without resort to the federal courts. It would appear, therefore, that if state common law remedies are sufficient to accord due process in a "liberty" case, they are certainly sufficient in a "property" interest case where the interest itself exists only because of state law.

Where there has been a prima facie case of the deprivation of a property right, the inquiry of the federal court should be two-fold. First, the court should examine whether there are state post-termination mechanisms which the employee can use to vindicate the wrongful deprivation. Just as the Court in Paul v. Davis, supra, found a "classic claim for defamation actionable in the courts of virtually every State" to be sufficient to assure due process, so here, a classic claim sounding in contract is actionable in Illinois and in most other states.

The second inquiry should be whether the state post-termination mechanisms are designed to make the employee whole, in the approximate fashion as would a pre-termination hearing.

This second inquiry was addressed in Goldberg v. Kelly, 397 U.S. 254 (1970). That case involved the question of whether a post-termination hearing was sufficient to assure due process to a welfare recipient who, without any hearing, was summarily removed from the rolls and refused further benefits. The Court held that welfare recipients comprise a very special category of governmental beneficiaries, "the crucial factor" in that case being that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." The Court, in carving out this exception, however, made the careful distinction between welfare recipients and "virtually anyone else whose governmental entitlements are ended" including "the blacklisted government contractor

[and] the discharged government employee."

It is interesting to note that Justice Black's dissent in Goldberg accuses the majority of forbidding "any conduct that a majority of the Court believes 'unfair,' 'indecent' or 'shocking to their consciences.'" Unfortunately, that is exactly what the lower courts continue to do in their attempts to follow the general line of reasoning in the Supreme Court's due process cases.

Since the purpose of the due process clause is to assure that an employee does not permanently and wrongfully lose his property, it would seem that if the state assures that the property or its equivalent is returned intact - when wrongfully taken - that is all that can be expected of the state. If the claimant cannot be made whole through post-deprivation procedures, only then might there be cause to require a pre-deprivation hearing.

It is difficult to understand why, if a "property" right is established only through the

operation of state law, the state cannot also be the vehicle for assuring redress where that property right is wrongfully deprived. It should be understood at the outset that we are dealing here not with poor, uneducated welfare recipients, Goldberg v. Kelly, supra, nor with persons whose right to heat and light in their homes is left to the unfettered discretion of a faceless bureaucrat who apparently will not listen to their pleas, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), nor with the possible deprivation of a fundamental right itself guaranteed by the U.S. Constitution, i.e., free speech, freedom from unreasonable search and seizure, etc. Instead, what we have here is two competent adults who have entered into an armslength agreement, one of whom may have breached that agreement. Though the employer may have overstepped the bounds of good management, to have the federal court step in to vindicate this alleged wrong on the basis of a perceived constitutional right is absurd.

It is interesting to note that on two occasions judges have accused their brethren of "trivializing" the Constitution. Memphis Light, Gas and Water Div. v. Craft, supra; dissent in Vail v. Board of Education, slip op. at 41. Is the danger of such "trivialization" not greater than the "danger" that a public employee may have to wait for a decision of a state court before approaching the federal court?

Dissenting judges in substantive due process cases have also urged what is, in effect, an exhaustion of remedies requirement so as to give state courts the chance to rule on the constitutionality of their own state laws. In Wisconsin v. Constantineau, 400 U.S. 433 (1971) Justice Blackman stated in dissent:

> "It is impossible for me to believe that the Supreme Court of Wisconsin would uphold any such boundless power over the lives and liberties of its citizens .... I realize that there are many cases where federal courts should not stay their hands to permit state courts to interpret state law .... Here, however, no state court appears to have passed on this Act at all, and a state decision might well apply the

> bond of other state law to require notice, hearing, and other necessary provisions to render the challenged Act constitutional."

In Logan v. Zimmerman, 102 S. Ct. 1148 (1982), involving both an equal protection question and a due process analysis, Justices Powell and Rehnquist, concurring in the judgement on equal protection grounds, raised a serious question as to the scope of the majority opinion with regard to the due process issue. In response to the majority opinion that "seeking redress through a tort suit is apt to be a lengthy and speculative process which in a situation like this one will never make the complainant entirely whole" Justice Powell noted that:

> "It is necessary for this Court to decide cases during almost every term on due process and equal protection grounds. Our opinions in these areas often are critized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine justices, consistency of language is an ideal unlikely to be achieved. Yet, I suppose we would all agree - at least in theory - that unnecessarily broad statements of doc-

> trine frequently do more to confuse than to clarify our jurisprudence."

There is a constant argument, particularly in these times of reductions in force and tight budgets, between employees who claim some type of "implied contract" right and school boards who claim that all employees are "employees at will" and can be fired on a moment's notice. The employee who can prove the existence of a contract and its breach should be awarded money damages in the state courts. However, the Constitution should not be used as an instrument to solve every civil squabble between public officials and their employees.

Judge Eschbach suggests that:

> [I]f state officials want to avoid the federal courthouse, they need merely provide a meaningful predeprivation hearing. And finally, of course, the state may choose not to employ individuals for short, fixed terms; indeed, such contracts may be rather unusual for reasons having nothing to do with the hearing requirement imposed by the due process clause.

Not only is this suggestion impractical and a

blatant example of judicial policy-making, it is also inaccurate. All states provide for probationary periods before tenure is acquired. "Short, fixed term" contracts are not the exception, but the rule for all beginning teachers. See Appendix A.

CONCLUSION

The cases on due process over the past decade are confusing and leave much uncertainty. Yet, given the consequences of losing a federal case and the fact that students and teachers are "making a federal case" of every perceived wrong, school boards have been forced into a bureaucratic nightmare of writing and enforcing long, involved policies. "Imposing additional administrative safeguards might reduce the risk [of wrongful terminations] marginally, but would also entail a significant intrusion into an area of primary educational responsibility." **Ingraham v. Wright**, 430 U.S. 651 (1972). In addition, when the citizens of this country see

their Constitution "trivialized" to the point that the lower court has done, they begin to think of that great, flexible, enduring document as merely a "loophole" - an unfortunate and tragic result. We hope that in re-examining its earlier decisions, this Court will provide a massive infusion of common sense into this body of constitutional law.

Respectfully submitted

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APPENDIX A

Each state has a provision in its respective teacher contract law setting forth the amount of time in position required to achieve tenure. Once tenure is achieved the laws create a property right which can only be taken through certain procedures, as specified in the statutes.

Following is a list of the times in position required by each state to attain tenure.[1]

THE LENGTH OF PROBATION FOR NONTENURED EMPLOYEES IS --

- A majority of the school year:

  South Carolina.

- One year:

  Mississippi (nonrenewal), Washington.

- Two years continuous employment in the school district:

  Alaska

- The first two years of the contract:

  Nebraska (Class I, II, III, VI districts).

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[1]Compiled by Washington State Senate. See Statutory Requirements of Teacher Contract Laws: A Comparison of the 50 States' Continuing Contract and Teacher Tenure Laws. December, 1976. Staff Contact: Kris Van Gorkom, Senate Research Center.

- Two years:

  Illinois (districts, optional third year).

- Not to exceed two years:

  Maine, Maryland.

- Two consecutive years:

  Hawaii (may be expanded to five years).

- First two years of employment in the school district:

  Illinois (district, optional third year), Michigan (optional third year), Pennsylvania.

- First two consecutive years of employment in the school district:

  Iowa (optional third year), Minnesota (all other cities).

- Three years in the state, two years in the school district:

  Delaware.

- Three consecutive years:

  Alabama, Arizona, Colorado, Connecticut, Georgia, Idaho, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, Tennessee, West Virginia, Wisconsin (counties with over 500,000 population), Wyoming.

- First three consecutive years:

  Minnesota (first

- First three years:

Missouri (metropolitan districts).

- Three years consecutive:

  California, Massachusetts, Texas (optional fourth year), Wisconsin (Milwaukee).

- Three consecutive years plus reemployment:

  Nebraska (Class IV or V districts, optional additional two years probation), New Mexico.

- Three years for the right to a hearing:

  New Hampshire.

- Three years:

  Illinois (cities), Louisiana, Maine, Dakota, Tennessee, Virginia, West Virginia.

- Three out of five years in the school district:

  Florida (optional fourth), Ohio.

- Four consecutive years in the same school in the same school district:

  Kentucky.

- Five successive years plus reemployment:

  Indiana, Missouri (statewide).

LENGTH OF PROBATIONARY PERIOD FOR CONTINUING CONTRACT TEACHERS WHO TRANSFER TO A NEW SCHOOL DISTRICT:

- No probationary period:

  Florida (at board's option), Pennsylvania, Rhode Island (unless notified).

- One year:

  Kentucky (at board's option), Michigan (may be waived), (all other cities), Virginia (may be waived), Washington.

- Eighteen months:

  Connecticut.

- First two years of contract:

  Nebraska (Class I, II, III, VI district).

- Two years:

  Nevada, New York, North Carolina (may be waived).

- Two consecutive years employment in the school district:

  Iowa (optional third, may be waived), Kansas (may be waived).

- Two consecutive years plus reemployment:

  Alaska, Wyoming (may be waived).

- Three consecutive years plus reemployment with the school district:

  Alabama, Georgia (with the same school board), New Mexico.

- First three consecutive years of employment:

  Minnesota (first class cities).

- Three successive years under contract:

  Nebraska (Class IV and V district probation).

- State board may grant tenure to any teacher who has been continuously employed for thirty-six months or who has previously had tenure in that or any other school district:

  Colorado.

- Three years in the state, two years in the school district:

  Delaware

- Three years:

  California, Louisiana, Massachusetts (one year at board's option).

- Five consecutive years plus reemployment in a school district:

  Nevada, Missouri (statewide).